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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-218

WILLIAM A. SMITH, ET AL., *Petitioners,*

v.

THE BOARD OF EDUCATION, PINELLAS COUNTY, FLORIDA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinions of the district court dated December 28, 1967, on plaintiffs' motion for preliminary injunction and for the convening of a three-judge court (21a-36a); of July 19, 1968, on plaintiffs' motion for summary judgment (38a-41a); and of March 23, 1970, following trial (Pet. App. 1a-9a), are severally unreported.* .

The opinion of the court of appeals (Pet. App. 10a-13a) is reported at 438 F.2d 1209.

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* Numbers suffixed with "a" appearing in parentheses refer to the appendix of pleadings and testimony used in the court below.

JURISDICTION

The judgment of the court of appeals (Pet. App. App. 17a-18a) was entered on March 2, 1971. The petition for writ of certiorari was filed on May 28, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether further review is required of the concurrent findings below that, in dismissing surplus teachers consequent upon a consolidation of junior colleges, "the evaluation procedure was honestly conducted by qualified professionals acting in a professional way, who were not motivated or influenced by racial considerations," where the burden of proof at the trial was placed on the defendant school officials, and where the dismissed plaintiffs offered no witnesses to testify to their teaching capabilities.

2. Whether further review is required of the holding below that the district court properly applied the governing state statutes and that it did not abdicate any duty imposed upon it by the doctrine of pendent jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment is sufficiently familiar to the Court as not to require quotation.

2. Nothing turns on the terms of 42 U.S.C. § 1983 (R.S. § 1979), "Civil action for deprivation of rights."

3. The Florida statutes relied on by petitioners are set out at Pet. App. 14a-16a.

STATEMENT

A. Background of the Controversy

The facts out of which the present proceeding arose were summarized as follows by the court of appeals (Pet. App. 10a-11a):

"Confronted with plummeting attendance and skyrocketing costs, the Skyway Campus of the St. Petersburg Junior

College was closed in 1967 and its activities were merged into the two other campuses in the system.

"At closing time there were 31 black and 8 white teachers at Skyway. Nineteen of the black teachers and four of the white teachers were reassigned to the remaining campuses. This left twelve black teachers and four white teachers not reassigned within the junior college system because there were no places available. The black teachers had attained tenure status; the white teachers had not.

"Seven of the twelve black teachers not immediately reassigned brought this suit. They alleged that they had been denied reassignment within the junior college system solely because of their race and in violation of the Florida teacher tenure laws.

"Of the seven plaintiffs, one was offered a position as a high school teacher and accepted it, one was offered a position as an instructor in typing and shorthand and accepted it, two were offered positions in the county school system and declined, one has been re-employed as an instructor in education, one who had no master's degree and was thus ineligible to teach in the junior college system was offered a place as a program planner, but declined. Only one of the plaintiffs has not been offered employment or reemployed."[1] [Footnote in original:][1] "Of the four white teachers, one resigned for personal reasons, one accepted a position at another junior college, and two accepted positions in the Pinellas County School System rather than to be terminated."*

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* An eighth black teacher sued unsuccessfully in the state courts. *Burney* v. *Board of Public Instruction of Pinellas County*, 209 So. 2d 671 (Sup. Ct. Fla., certiorari denied without opinion, Jan. 1968). She has since been reemployed by St. Petersburg Junior College.

B. Travel of the Litigation

In their complaint filed September 1, 1967 (427a), the seven plaintiffs sought an injunction against enforcement of § 231.36(2) of the Florida Statutes (Pet. App. 15a) on the ground of unconstitutionality, and requested the convening of a three-judge court (20a). Both applications were denied by the district court on December 28, 1967, which held that the constitutional grounds asserted were insubstantial (21a-36a).

Plaintiffs then moved for summary judgment (37a), a motion denied on July 19, 1968, on the ground that "there is a genuine issue as to the relevant facts relating to the evaluation of the qualifications of the respective plaintiffs" (41a).

None the less, both in that opinion as well as in the later opinion filed following plenary trial, the district court shifted the burden of proof to the defendants, saying (40a-41a; Pet. App. 3a-4a):

> "The Court finds the closing of Gibbs-Skyway was not a direct result of desegregation as such. This leaves as an issue to be tried the question as to whether the treatment, i.e., dismissal, transfer, or failure to re-employ, as the case may be, of the respective plaintiffs was racially motivated or in some other way violative of their constitutional rights. Having found that the closing of the Gibbs-Skyway campus was not a direct result of desegregation as such, the full justification of the rule in *United States* v. *Jefferson Board of Education*, 372 F.2d 836 (5 C. 1966), to the effect that, at 900:
>
> > 'If, as a result of desegregation, there is to be a reduction in the total professional staff of the school system, the qualifications of all staff members in the system shall be evaluated in selecting the staff member to be released without consideration of race or color.'
>
> is not binding in this case.

> "However, since plaintiffs allege, and it is established, that each of them is a Negro and they strenuously contend that their dismissal was a result of desegregation the Court is of the opinion that the *Jefferson* rule, supra, should be among those applied in considering the treatment of each."

See also Pet. App. 4a-5a, again shifting the burden of proof because "it is clear that effects of *de jure* segregation remain in the college system."

C. Conduct of the Evaluation

An extensive stipulation of facts, reproduced only in part at 42a-52a), preceded a three-day trial that produced a transcript of over 700 pages, exclusive of numerous exhibits.

Thereafter the district court made the following finding concerning the teacher evaluation that resulted in the dismissals now in issue (Pet. App. 5a):

> "Prior to its closing the Skyway Campus was one of three branches of the St. Petersburg Junior College. Each campus had a Dean of Instruction; Dr. Johnnie Ruth Clarke was at Skyway, Mr. E. L. Noel, Jr., was at the St. Petersburg Campus and Dr. Phillip Frederickson was at the Clearwater Campus, all were under the direct supervision of Dr. Richardson Ernst, Dean of Academic Affairs for the college. The evidence established that the principal responsibility of these four was to have a continuing knowledge of the performance of the teachers at the respective campuses and that they did so. As Dr. Ernst testified:
>
> "'We knew their particular strengths and weaknesses.'
>
> The ultimate decision with regard to each of the plaintiffs was made by these four persons after an all day conference in which they evaluated each in comparison with all others within the relevant discipline in the system."

Dr. Clarke, the Dean of Instruction at Skyway mentioned in the foregoing finding, is black (259a); her doctoral

studies were performed "in the area of Teaching the Disadvantaged Child" (409a). Here is how she conducted her evaluation (361a):

> "I took time for these evaluations, and I wanted to write them rather than to make them orally, because I was making a report concerning faculty members, both Negroes and Whites—predominantly Negro—to an administration; and I wanted to be sure that I was as fair as I possibly could be both professionally and both as a Negro.
>
> "So that I took time to—I wrote them down, and then I set them aside to reconsider and recheck.
>
> "I talked with some of the Department Chairmen informally, because I wanted to be sure. And then I rewrote them, because I thought this was a much better way of presenting them than to try to trust my own memory."

The district court made detailed and specific findings as to five of the plaintiffs (Pet. App. 6a-8a); for present purposes it seems sufficient simply to summarize the highlights:

William A. Smith. Rated poor by Dr. Clarke (367a) and others; later accepted a position as high school teacher.

Esther Harris. Rated fair as a teacher of business skills, but limited to typing and shorthand, whereas the other teachers in the field had broader skills. A year later when a position limited to typing and shorthand became available, it was offered to her and she accepted.

Essie M. Roberts. Rated poor by Dr. Clarke (362a) and others; her other difficulties are set out at Pet. App. 7a.

Ollie H. Phipps. Rated poor by Dr. Clarke (365a) and others; he had communication difficulties; the record suggests a stutter (Tr. 597).* He declined the offer of a position in the school system.

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*"Tr." refers to the pages of the trial transcript that were not included in the appendix used below.

Milton M. Rooks. He died in December 1968, prior to trial (Tr. 8); the district court offered to substitute a personal representative (Tr. 9; 66a); failure to mention him in the present petition (Pet. 13-17) suggests that his claim is no longer being pressed.

The record shows the following as to the two plaintiffs not specifically mentioned in the district court's opinion:

Mary O. Brown. She was reemployed in August 1968 (95a-96a).

Eloise Perkins. She was a counsellor rather than a teacher when the Skyway campus was closed, and she lacked the master's degree requisite for junior college teaching (Tr. 190). When she was offered a position in program planning at the Clearwater campus, she failed to show interest and instead elected to retire (127a, 138a; Tr. 181, 185-186; 141a-142a, 292a-296a, 300a-305a).

None of the plaintiffs offered any witnesses to testify to their teaching abilities. Accordingly the district court concluded (Pet. App. 8a):

> "The Court finds that the evaluation procedure followed was honestly and fairly conducted by qualified professionals acting in a professional way, who were not motivated or influenced by racial considerations. The procedures comport with constitutional standards and the law.
>
> "The defendants have sustained the Court imposed burden placed upon them."

Following judgment of dismissal and appeal (425a-426a), the court of appeals, after quoting the foregoing, said (Pet. App. 12a):

> "The findings are abundantly supported by the record; indeed much of the evidence to that effect met with no attempted refutation. Rule 52 (a), Federal Rules of Civil Procedure, [the clearly erroneous rule] directs that such findings shall not be set aside. We cannot disregard the Rule."

D. The Pendent Jurisdiction Issue

In their original complaint filed September 1, 1967, as well as in their amended complaint dated October 22, 1968, petitioners alleged that Section 231.36(2) of the Florida Statutes (Pet. App. 16a) was unconstitutional because it involved an impairment of contracts (¶ 14), because it violated both the due process and equal protection clauses of the Fourteenth Amendment (¶ 15), because it was void for vagueness (¶ 16), and because its application was discriminatory (¶ 17).

Section 231.36(2), assailed as unconstitutional by petitioners, provides for the process of selecting teachers for retention when a consolidation of schools takes place. In that event, when it becomes necessary "to choose from among its personnel who are on continuing contracts as to which should be retained, among the criteria to be considered shall be educational qualifications, efficiency, compatibility, character, and capacity to meet the educational needs of the community." Then follows the clause on which petitioners concentrated: "The decision of the board shall not be controlled by any previous contractual relationship."

In their second amended complaint, filed on the eve of trial (61a, 64a-65a), petitioners re-alleged unconstitutionality of Section 231.36(2), see ¶¶ 15-18; 7a-8a, and then added a second count in which they relied on Section 231.36 (Pet. App. 14a-15a) as a basis for their rights to continued employment (¶¶ 20-26; 8a-10a).

Section 231.36 provides in pertinent part (italics added):

> "Each person to whom a continuing contract has been issued as provided herein shall be entitled to continue in his position or in a similar position in the county at the salary schedule authorized by the county board without the necessity of annual nomination or reappointment *until such time as the position is dis-*

> *continued*, the person resigns, or until his contractual status is changed as prescribed in (1) or (2) below." [Subsection (2) is set out at Pet. App. 16a.]

The foregoing provision was specifically incorporated in each of the petitioners' continuing employment contracts in these terms (Appendix of Exhibits below at pp. 5e, 7e, 9e, 11e, 13e, 15e, 17e):

> "9. This contract shall not operate to prevent discontinuance of a position as provided by law (Sections 220.23(7) and 231.36, Florida Statutes 1949)."

Following conclusion of the trial, the district court held (Pet. App. 8a) that "The procedures comport with constitutional standards and the law."

On appeal plaintiffs urged that the district court failed to exercise its pendent jurisdiction to determine whether there had been compliance with the Florida statutes.

The court below, however, held that the last phrase of the foregoing quotation, "and the law," indicated that the district court did indeed pass on the question of state law, after which the court of appeals proceeded to make an articulated examination of the Florida statutes (Pet. App. 12a-13a). Following such examination, the court of appeals concluded (Pet. App. 13a):

> "We are of the opinion, from this record, that the trial judge did apply the plain words and the clear intent of the quoted statutes and that he did not abdicate any duty imposed upon him by the doctrine of pendent jurisdiction."

The district court's judgment of dismissal was thereupon affirmed (Pet. App. 17a-18a).

ARGUMENT

A number of compelling reasons combine to demonstrate why this case is not a suitable vehicle for resolution of any of the broad questions of educational policy tendered by the petition for certiorari.

First. By way of highly significant preliminary, petitioners complain of racial discrimination when the record shows that the controlling evaluations originated with a dedicated black educator, whose approach is highlighted by the circumstances that she took her doctorate "in the area of Teaching the Disadvantaged Child" (409a), and that in making her evaluation "I wanted to be sure that I was fair as I possibly could be both professionally and both as a Negro" (361a).

Next, petitioners urge additional "procedural protections" (Pet. 18), although in this case, where the burden of proof was shifted to the defendant school board and officials (40a-41a; Pet. App. 3a-4a), petitioners offered no witnesses whatever to testify to their own teaching qualifications. Thus the "onerous burden" of which petitioners speak (Pet. 22) was placed, not on them, but rather on the shoulders of the school authorities—and the latter "sustained the Court imposed burden placed upon them" (Pet. App. 8a). Consequently petitioners' case was deficient, not in procedural safeguards, but in evidentiary support.

It is significant that, of the seven plaintiffs who commenced the present action, the only ones not reemployed by St. Petersburg Junior College were the four who were rated "poor"—Smith, Roberts, Phipps and Rooks—and the non-teacher, Perkins, who refused a planning job and retired. The other two, Brown and Harris, are currently employed at St. Petersburg Junior College (95a-96a [Brown]; Pet. App. 7a [Harris])—although the petition in discussing their particular situations never once mentions the fact of their reemployment (Pet. 13-15).

Finally, petitioners suggest (Pet. 27) that "It may well be that the only means of insuring that racial discrimination and prejudice does not enter the faculty selection process where teachers are being chosen for reemployment in desegregation situations, is to require selection exclusively on the basis of seniority and length of tenure."

Passing the point that both courts below found (40a; Pet. App. 3a, 10a) that this was *not* a desegregation situation, and assuming that the foregoing formulation is neither a plea to make the profession of school teaching safe for mediocrity nor a request that this Court legislate standards for teacher retention, it seems sufficient simply to point out, first, that Florida has established criteria different from those urged by petitioners, and, second, that two courts have found that racial discrimination did not in fact enter into the selection process involved in the present case.

The Florida formula for retention in cases of consolidation is neither seniority nor tenure, but rather "educational qualifications, efficiency, compatibility, character, and capacity to meet the educational needs of the community" (§ 231.36(2), Pet. App. 16a). And in this case two courts have found (Pet. App. 8a, 11a-12a) that "the evaluation procedure followed was honestly and fairly conducted by qualified professionals acting in a professional way, who were not motivated or influenced by racial considerations."

Second. The principles of law applied in this case are completely consistent with those that have ruled teacher evaluations in every consolidation situation heretofore considered by other circuits.

1. The courts below in this case proceeded on the basis that, consequent upon consolidation, the teachers of the discontinued school must be compared, not among themselves, but with all other teachers in the system (Pet. App. 5a,

quoted above at p. 5; Pet. App. 11a). Three other circuits have applied the same rule. *Franklin* v. *Giles County*, 360 F.2d 325 (C.A. 4); *Chambers* v. *Hendersonville City*, 364 F.2d 189 (C.A. 4); *North Carolina Teachers Ass'n* v. *Asheboro City*, 393 F.2d 736 (C.A. 4); *Hill* v. *Franklin County*, 390 F.2d 583 (C.A. 6); *Rolfe* v. *Lincoln County*, 391 F.2d 77 (C.A. 6); *Jackson* v. *Wheaton School District No. 28*, 430 F.2d 1359 (C.A. 8).

2. The courts below in this case shifted the burden of proof to the defendant school authorities (Pet. App. 3a-5a, 8a), again in accord with rulings in other circuits. *Chambers* v. *Hendersonville City*, 364 F.2d 189 (C.A. 4); *Wall* v. *Stanly County*, 378 F.2d 275 (C.A. 4); *Hill* v. *Franklin County*, 390 F.2d 583 (C.A. 6).

3. In disregarding the plaintiffs' objections that the defendants "relied exclusively on the oral testimony of school officials at trial" (Pet. 8), the courts below followed the Fourth Circuit's earlier ruling in *North Carolina Teachers Ass'n* v. *Asheboro City*, 393 F.2d 736, 745, that the absence of written criteria for evaluation did not constitute a controlling factor. Significantly enough, Dean Clarke in this case made her initial evaluation in writing although not required to do so (360a-361a).

Thus the present case is a purely factual one, the outcome of which underscores what was said by the Eighth Circuit in *Walton* v. *Nashville, Arkansas*, 401 F.2d 137, 144:

> "Those who are employment victims of the constitutionally required process should not immediately jump to the conclusion that their predicament is necessarily the result of racial considerations. They have every right to demand and to be shown that race is not the criterion by which employment is granted or denied. They must, however, face the fact that integration tends to do away with expensive and unnecessary duplication for districts already too short of funds and that often some persons will be terminated."

In this case, as in that one (401 F.2d at 145), "The facts here simply do not add up to a showing of discrimination. And when the facts do not do this the teacher's case must necessarily fall."

Third. The issue of pendent jurisdiction raised by petitioners (Pet. 28-35), to the effect that the district court "abused its discretion in failing to rule upon petitioners' pendent state claims" (Pet. 2, Question 3), is disposed of by the conclusion below (Pet. App. 13a) "that the trial judge did apply the plain words and the clear intent of the quoted statutes and that he did not abdicate any duty imposed upon him by the doctrine of pendent jurisdiction." Not only that, but the decision below was plainly right—although this conclusion may well appear clouded over in consequence of petitioners' resort to language that cannot be found in the statute book.

1. As we have already shown, *supra* p. 8, reliance on the Florida statutes was an afterthought that did not surface until the filing of the Second Amended Complaint. The district court held that the evaluation/dismissal procedures "comport with * * * the law" (Pet. App. 8a), after which the court of appeals concluded that "the plain words and the clear intent of the quoted statutes" had been applied (Pet. App. 13a). Thus, even on the assumption that the district court did not in fact exercise pendent jurisdiction, reversal on the basis could not possibly lead to any different result, inasmuch as the district court thereafter would, very clearly, be bound to follow the appellate ruling.

2. Actually, and the afterthought character of the pendent jurisdiction contention simply underscores the point, petitioners' statutory contention is wholly without substance.

The statute on which they rely (§ 231.36; Pet. App. 14a-15a) provides that a teacher with a continuing contract may continue in his position "until such time as the position is discontinued." And the continuing contract in issue here specifically provided in each instance (*supra,*

p. 9) that "This contract shall not operate to prevent discontinuance of a position as provided by law (Sections 220.23(7) and 231.36, Florida Statutes 1949)." Thus, reading the statute together with the contract, it is plain that every teacher with a continuing contract must face, and here indeed had accepted, the risk of discontinuance, and that neither statute nor contract protects him in that instance—always provided, of course, that the comparative evaluation is fair. Here both courts found that it was, from which it necessarily followed, as both courts then held, that § 231.36 gave the teacher nothing more.

3. The petition for certiorari herein confuses the matter by speaking throughout of "tenure" and "tenured," words that convey a suggestion of permanence. But the permanence is semantic only, since the statutes differentiate only between teachers on annual contract and those on continuing contract. Once the fog of non-statutory characterization is dispelled, it is apparent that the Florida statute on which petitioners' late reliance is bottomed does not create any such condition of tenure as will survive discontinuance of a position. Cf. *Donegan* v. *Dyson,* 269 U.S. 49.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be denied.

Respectfully submitted.

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